UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALSTATE MAINTENANCE, LLC

and Case No. 29-CA-117101

TREVOR GREENIDGE, an Individual.

RESPONDENT ALSTATE MAINTENANCE, LLC'S POST-HEARING BRIEF

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BRIEF OF RESPONDENT ALSTATE MAINTENANCE, LLC

Respondent Alstate Maintenance, LLC ("Alstate" or "Respondent") submits this brief in support of its position that the Amended Complaint and Notice of Hearing is without merit and should be dismissed in its entirety.

STATEMENT OF THE CASE

As set forth more fully below, the National Labor Relations Board ("Board" or "NLRB") lacks jurisdiction over Respondent, as Respondent is a derivative carrier subject to the exclusive jurisdiction of the Railway Labor Act ("RLA"). Even assuming, *arguendo*, that the Board did have jurisdiction over Respondent – which it does not – Respondent discharged Trevor Greenidge at the request of Respondent's customer – Terminal One Group Management Association, L.P. – and after Mr. Greenidge refused, without reason, to assist airline customers with their luggage.

PROCEDURAL HISTORY

Mr. Greenidge filed an unfair labor practice charge (Case No. 29-CA-117101) on or around November 13, 2013, against Respondent, alleging Respondent violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act ("NLRA") by discharging Greenidge in retaliation for his protected concerted and other union activities.

On June 27, 2014, the Regional Director for Region 29 of the National Labor Relations Board ("Region 29") dismissed the charges filed against Alstate. On October 30, 2014, General Counsel sustained Mr. Greenidge's appeal of the previous dismissal. On November 21, 2014, the Regional Director issued a Complaint and Notice of Hearing in Case No. 29-CA-117101 ("Complaint"), in which the Regional Director alleges Mr. Greenidge "complain[ed] that the amount of tips received for performing services to a certain customer may

be unsatisfactory" and that Alstate terminated Mr. Greenidge's employment in violation of Section 8(a)(1) of the Act. (GC Ex. 1).[1] Respondent filed an Answer denying the substantive allegations, and denying further that the Board has jurisdiction over Respondent, as Alstate is a derivative carrier subject to the exclusive jurisdiction of the Railway Labor Act ("RLA") on December 10, 2014. (GC Ex. 1).

On December 19, 2014, Acting Regional Director for Region 29 issued an Order Further Consolidating Cases and Notice of Hearing, consolidating this case with Case Nos. 29-CA-104000, 29-CA-126794, 29-CV-103994, 29-CB-126867 and 29-CA-136782. (GC Ex. 1). On March 3, 2015, the Regional Director severed the above cases from this case. (GC Ex. 1).[2]

A hearing on the Complaint was held before Administrative Law Judge Raymond Green on May 22 and June 18, 2015 and on February 23, 2016.

STATEMENT OF THE FACTS

I. RESPONDENT'S BUSINESS

Alstate Maintenance, LLC contracts with Terminal One Management, Inc. (referred to also as "TOGA")[3] to provide skycap, wheelchair, baggage handling and passenger representative services to airlines at John F. Kennedy International Airport, Terminal One.[4] (Tr. 144, 180).

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[1] "(Tr.__)" refers to pages in the official transcript of the instant unfair labor practice proceeding held before the Board. "(GC Ex.__)", "(R Ex.__)" and "(J Ex.__)" refer to General Counsel's, Respondent's and Joint Exhibits, respectively. "(Local 660 Ex.__)" refers to documents submitted by Local 660 in the related matter.

[2] The parties have agreed to incorporate the record transcript from those related cases herein, to the extent such record pertains to Alstate's defense that it is not subject to the Act on account of its derivative carrier status.

[3] TOGA is a partnership of several airlines operating out of Terminal One, including Lufthansa, Air France, Korean and Japan Airlines. (Tr. 180).

[4] Alstate also provides services at Terminal Four. (Tr, 144).

A. Alstate's Contract With TOGA

Alstate's contract with TOGA dictates specifically the manner in which Alstate may operate and controls virtually every aspect of Alstate's operation. By way of brief example, TOGA's contract with Alstate includes the following contractual provisions:

- TOGA retains the right to audit Alstate's records at any time. (GC Ex. 22, ¶1.2).
- TOGA must authorize all overtime work performed by Alstate employees. (GC Ex. 22, ¶1.3).
- Alstate must perform its services according to the strict guidelines in TOGA's contract. Specifically, Alstate employees must greet customers according to a script written by TOGA, must place baggage in the manner specified by TOGA and must direct passengers only to ground transportation authorized by Terminal One or the Port Authority. (GC Ex. 22, ¶2.2).
- Equipment used by Alstate's Skycap and Baggage Handler carts are designated with a Terminal One logo. (GC Ex. 22, ¶4.1(1)).
- TOGA conducts a weekly inventory of Alstate's wheelchair and ancillary services equipment. (GC Ex. 22, ¶4.2).
- Alstate's wheelchair attendants provide services based on TOGA's flight schedule. (GC Ex. 22, ¶5.1).
- Alstate's "levels of manpower" are "subject to modification by TOGA". (GC Ex. 22, ¶5.3).
- Alstate must, upon the request of TOGA, remove from services and replace any personnel who "in the sole opinion of TOGA, display improper conduct or are deemed not qualified to perform the duties assigned to them." (GC Ex. 22, ¶5.5).

- TOGA requires Alstate train its employees "with all applicable standards and requirements, including those of . . . the Carrier." (GC Ex. 22, ¶ 5.6).
- All Alstate employees must wear a uniform that identifies them as representatives of Terminal One. (GC Ex. 22, ¶5.7).
- TOGA provides Alstate with offices at JFK. (GC Ex. 22, ¶7.1).
- TOGA must maintain a supervisor on-site at all reasonable times for consultation with Alstate with respect to service. (GC Ex. 22, ¶5.2).

B. TOGA's Control Over Alstate's Hiring Decisions

After Alstate began serving Terminal Four, TOGA demanded that no Alstate management employees working at TOGA be transferred to work at the new terminal. Indeed, TOGA required there be "complete separation between the two [terminals]." (Local 660 Ex. 17). To that end, when Alstate determined it needed to temporarily reassign one of its managers, Louise Consiglio, to assist in the start-up of operations at TFAC, it was required to first request permission from TOGA's Executive Director. (R Ex. 1). Ms. Consiglio was not reassigned until after permission was granted.

C. TOGA Requests Alstate Discipline And Terminate Alstate Employees, And Alstate Complies With These Requests

As stated above, Alstate's contract with TOGA provides TOGA with the right to demand removal of any Alstate personnel who "in the sole opinion of TOGA, display improper conduct or are deemed not qualified to perform the duties assigned to them." (GC Ex. 22, ¶5.5). (emphasis added). TOGA, exercising this right, threatened Alstate that if Alstate did not correct perceived deficiencies in performance, TOGA would "have little choice but to make a change ... and [the change] will be reassignment of the "Managers." (R Ex. 8).

TOGA has required Alstate reassign or terminate its own employees. On September 27, 2007, TOGA demanded Alstate terminate a baggage handler after TOGA learned the employee had stolen a passenger's wallet. As requested, and without performing an independent investigation, Alstate terminated the employee that same day. (GC Ex. 60). On July 29, 2012, TOGA informed Alstate that an Alstate employee violated terminal policy by requesting a passenger provide a monetary tip in exchange for transporting his baggage inside the terminal. After learning of the incident, Alstate did not terminate the employee, instead choosing to send him home until the Company determined what, if any, disciplinary actions to take. (R Ex. 3). A member of TOGA's management, however, disagreed with Alstate's handling of the issue, and admonished Alstate stating, "there should be a zero tolerance policy regarding the solicitation of money in exchange for services by Alstate employees" and stressed the "severity of the incident." Id. TOGA's Executive Director then emailed Alstate to advise Alstate that it was his hope that the employee in question was "history." Due to TOGA's concerns regarding this employee's behavior, Alstate terminated the employee. (R3, Tr. 222).

D. Carriers Control Alstate's Day-to-Day Operations

TOGA sets forth precise performance requirements in its contract with Alstate, mandating, *inter alia*, that Alstate employees interact with customers based on a script drafted by TOGA; place baggage in the manner specified by TOGA; and, direct passengers only to ground transportation authorized by TOGA or the Port Authority. (GC 22, ¶2.2).

Carrier control is not limited merely to the contract's stipulations, however, as TOGA repeatedly has exerted control over Alstate's policies and procedures. (R Ex. 7). By way of example, TOGA's Executive Director demanded Alstate revise its Standard Operating Procedures include specific language drafted by TOGA. (Local 660 Ex. 10). In a similar

example, TOGA strongly suggested Alstate implement a new system to "log" all claims regarding bag pickup and bag transfer, regardless of the fact the Company had processes already in place. (R Ex. 5). Alstate implemented the system as instructed. (Tr. 234).

With regard to Alstate's wheelchair services, the Company seeks instruction from its carrier customers regarding, *inter alia*, the type of wheelchairs Alstate should utilize. For example, following a customer complaint, Alstate requested Air France advise Alstate as to whether the Company should begin using wheelchairs with strap restraints. (R Ex. 4).

E. TOGA Directs And Supervises Alstate Employees

In TOGA's own words, its managers "micro-manage" and "delegate" Alstate employees. For example, management, a TOGA manager took issue with an Alstate baggage handler's performance. Instead of alerting an Alstate supervisor, the TOGA manager began instructing the employee on how to perform his job, "ask[ing] [the Alstate employee] to look inside the [carts] for AF011 bags." (R Ex. 8). The TOGA manager then "personally began" to assist the Alstate employee in locating and loading bags. Id.

TOGA's involvement goes beyond mere instruction and assistance, however, as the carrier has demanded employees be removed or reassigned mid-shift, without providing for any independent investigation by Alstate. For example, after an Alstate employee rudely responded to a TOGA managers, the manager requested Alstate remove the offending employee immediately. (R Ex. 7). TOGA managers have submitted reports regarding Alstate employees work ethic; Alstate's performance of its required duties; and, the level of Alstate's supervision over its employees. (R Ex. 9, R Ex. 10).

F. TOGA Controls Alstate's Staffing Decisions

Alstate employees' schedules are subject to change based on modifications the carriers make to their schedules throughout the day. Any overtime performed by Alstate employees, however, must be first approved by the carrier. (Local 660 Ex. 11). Further, Alstate cannot require employees stay after the end of their scheduled shifts if it will increase how many Alstate employees are working at any given time, as TOGA must approve – in advance – any change in Alstate's "level of manpower." (GC Ex. 22).

Carriers also have exercised control over Alstate's general staffing policies. In April 2012, Alstate changed an internal policy to provide that only one skycap agent could be used for wheelchair service at any given time. TOGA disagreed with the policy, and demanded Alstate provide a "complete explanation" regarding "the purpose of . . . [the policy change] and who authorized it." Alstate modified the policy in accordance with TOGA's requests. (Local 660 Ex. 14). On another occasion, TOGA mandated a new policy requiring service representatives remain at the Terminal after the last flight had deplaned and arrived at customs. Although assisting passengers with customs "is ultimately the responsibility of each individual carrier," TOGA insisted that "Alstate presence is necessary in the event that there is no carrier presence, so that airline staff can be called to help if . . . needed." (R Ex. 11).

Similarly, TOGA controls *which* employees are assigned to work for each particular carrier. By way of example, in or around September 2010, TOGA complained that Alstate reassigned a number of its "pit employees" (baggage handlers) from Terminal One to Terminal Four. (Local 660 Ex. 18). TOGA disagreed with Alstate's decision, and requested the employees be reassigned back to Terminal One. Id. In addition to exerting control over the staffing of Alstate's "rank and file" employees, carriers also control the staffing of Alstate's

management. For example, in or around July 2010, TOGA's Executive Director insisted Alstate reassign its daytime managers to evening shifts, as TOGA disapproved of the evening managers' performance. Alstate conceded to this demand. (R Ex. 8).

II. BRIEF OVERVIEW OF ALSTATE'S SKYCAP SERVICES

Alstate's skycaps are responsible for transporting airline passengers' luggage from the sidewalk outside Terminal One to their respective airline ticket counter. (Tr. 30). Skycaps are stationed "on the curb," meaning they stand on the sidewalk outside the Terminal's doors and wait for passengers to request assistance. (Tr. 58). The sidewalk itself is not large – Mr. Greenidge estimated it to be somewhere between three and twenty feet. (Tr. 58).

Typically, a passenger will indicate they need skycap services by "put[ting] their hands up" after parking their car at the Terminal curb. (Tr. 50). Skycaps then would "go and stand by the vehicle" as the passenger unloaded his or her bags. As it is customary for skycaps to receive tips, not every airline passenger uses or requests skycap services. (Tr. 50-51). However, and as confirmed by Mr. Greenidge, it is the skycaps responsibility to help every customer, "regardless of tip or not." (Tr. 59).

Skycaps also are expected to, when necessary, provide wheelchair attendant services. (Tr. 60).

III. BRIEF OVERVIEW OF MR. GREENIDGE'S EMPLOYMENT WITH RESPONDENT

Respondent hired Mr. Greenidge in or around February 2005. (Tr. 29). With the brief exception of an eight month period in which he was a Supervisor, Mr. Greenidge worked as a skycap throughout his employment with Alstate. (Tr. 29, 56).

Throughout his employment, Mr. Greenidge received a number of written warnings and disciplines for, *inter alia,* failing to perform certain basic job functions or for being indifferent to the airline's customers. (J Ex. 3(a) – (d)). On October 11, 2011, Mr. Greenidge received a written warning and a two-day suspension for failing to provide wheelchair services to airline passengers. (J Ex. 3(c)). Though the wheelchair dispatcher requested Mr. Greenidge provide the services, Mr. Greenidge refused "linger[ing] around until [he] could pass the request" to another employee. Id. As a result of Mr. Greenidge's "indifference," the passengers waited an "unreasonable amount of time for their wheelchairs resulting in complaints from the airlines." Id.

Terminal Manager Louise Consiglio instructed Mr. Greenidge to "do whatever is required for you to improve your attitude and awareness of the services Alstate provides in this terminal." Id. The warning, which Mr. Greenidge signed, informed Mr. Greenidge that continued violations of Company policy would result in "more severe disciplinary action up to and including termination." Id.

IV. EVENTS OF JULY 17, 2013

On July 17, 2013, Lufthansa Airlines Station Manager Isabelle Roeder contacted TOGA Manager on Duty Klaudia Fitzgerald to inform Ms. Fitzgerald that a German soccer team traveling on Lufthansa "required assistance because they were traveling with equipment." (Tr. 168). In turn, Ms. Fitzgerald contacted an Alstate supervisor to "make sure" the four skycaps on duty – Terrance Boodram, Basil Rodney, Allan Wills and Mr. Greenidge – were waiting at the terminal curbside to assist with the passengers' luggage *when the passengers arrived at the*

Airport. (Tr. 34, 41, 181-82). The supervisor, Mr. Crawford, relayed this instruction to Mr. Greenidge, Rodney and Mr. Wills.[5] Id.

As it was a "very slow evening," the four skycaps already were stationed in front of the terminal "awaiting [other] passengers." (Tr. 33). Despite this – and despite Ms. Fitzgerald's and Mr. Crawford's clear instructions – none of the skycaps were waiting to assist the Lufthansa passengers upon arrival, nor did the skycaps attempt to assist the passengers after they arrived. (Tr. 169). Notably, Mr. Greenidge was not assisting another customer, and observed the truck arrive. (Tr. 71). After realizing the skycaps were not assisting the passengers as requested, Ms. Roeder tried fruitlessly to "wave at the skycaps," but they were "walking away and didn't come back." (Tr. 169-170). After this attempt at getting the skycaps assistance failed, Ms. Roeder contacted Ms. Fitzgerald to inform her that "there was nobody outside willing to help bring the bags in." (Tr. 181).

Ms. Roeder waited with the soccer team's managers outside the terminal. (Tr. 170). A few minutes later, "[Mr. Crawford] came out and he went to the skycaps to speak to them." After speaking with the skycaps, Mr. Crawford approached Ms. Roeder and the soccer team's managers and stated the skycaps "don't want to take care of the equipment" because they did not believe they would receive a high enough tip. (Tr. 170-171, 182). Ms. Fitzgerald then joined Ms. Roeder, Mr. Crawford and the soccer team's managers outside, at which point she learned from Mr. Crawford that the skycaps were refusing to assist Lufthansa and the soccer team's passengers. (Tr. 182). Unfortunately, Mr. Crawford's explanation of the skycaps' behavior proved to be largely gratuitous, as Ms. Fitzgerald observed personally one skycap "two

[5] Mr. Boodram denies learning of the assignment from Mr. Crawford. (Tr. 105, 109).

or three feet away [from where Ms. Fitzgerald was standing] . . . just not approaching" and two others "walking away from us." (Tr. 182-83). Mr. Greenidge, who was *fifteen* feet away from Ms. Fitzgerald, Ms. Roeder and Mr. Crawford, observed Ms. Fitzgerald, Ms. Roeder and Mr. Crawford's discussion, but nonetheless refused to approach or otherwise assist them.[6] (Tr. 36, 170-171, 182). Ultimately, the skycaps ignored Lufthansa's passengers for a long enough period of time that the soccer team was able to remove between *fifty and seventy* pieces of baggage and oversized equipment from their truck and line the baggage and equipment on the Terminal's curb.[7] (Tr. 182, 189).

Given the skycaps demonstrated refusal to perform their job duties and assist the soccer team passengers, Ms. Fitzgerald "instructed Crawford to pull baggage handlers from inside of the building" to assist with bringing the soccer team's bags into the terminal – despite the fact baggage handlers do not have the same job duties as skycaps and are "contracted for a totally different purpose." (Tr. 182). These baggage handlers – who were the first Alstate employees to assist the soccer team passengers – transported the first two carts of bags and

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[6] Mr. Greenidge denies that the truck had arrived during this conversation. (Tr. 36). Nonetheless, Ms. Roeder and Ms. Fitzgerald – who, as disinterested witnesses should be credited above Mr. Greenidge who has an obvious interest in this matter – confirm that the truck already had arrived. (Tr. 170-171, 182). Further, Ms. Fitzgerald stated that, of the four skycaps working that shift, she knew only "Mr. Wills." (Tr. 183). When asked if Mr. Wills was among the skycaps "standing on the curb not assisting . . . [or] walking away from you," Ms. Fitzgerald stated "I don't recall. *I don't think so*." (Tr. 183). Notably, Greenidge admits that Ms. Fitzgerald also waved at him (though Greenidge and Counsel for General Counsel characterized the gesture as "waving . . . in an outward motion"), to which he did not respond. (Tr. 37).

[7] To the extent General Counsel attempts to distinguish between the passengers' *bags* and the passengers' *equipment*, such distinction is meaningless. Multiple witnesses – including General Counsel's witness Terrance Boodram – confirmed that the soccer team's "bags" included "sports equipment, regular suitcases and . . . duffle bags." (Tr. 110); see also Tr. 181 ("I saw the soccer players were almost finished removing all of their baggage along with the equipment and it was already lined up neatly on the curbside."); Tr. 188 ("I think it was a combination of the equipment and their regular bags."). In fact, Mr. Greenidge's own affidavit attests that "On July 17th, 2013 at around 6:00 p.m. a little truck pulled up and they told us that a truck with some equipment for a soccer team would be arriving for Lufthansa Airlines." (Tr. 199). He testified inconsistently, however, that he was told to assist with the soccer team's "bags" and that he unloaded "bags . . . it was duffel bags." (Tr. 198).

equipment. (Tr. 183). Only after the baggage handlers began transporting the soccer team passengers' bags did Mr. Greenidge and the other skycaps begin assisting Lufthansa as requested. Despite the substandard service, Lufthansa gave the skycaps an $83 tip. (Tr, 44-45, J Ex. 1).[8]

Later that night, Ms. Fitzgerald reported the incident *via* e-mail to Alstate's General Manager Deb Traynor and Assistant Manager Vince Orodisio, as well as to Ed Paquette, as "it's part of [her] job description . . . [to document] any type of sub-standard service." (Tr. 183). Further, Ms. Fitzgerald believed the incident "was really rather embarrassing *because we've never experienced somebody totally denying to provide the service*." (Tr. 184). Ms. Fitzgerald described the incident as follows:

> As you may be aware, a French soccer team is travelling [*sic*] on LH405 tonight and on behalf of Lufthansa, we had requested skycap services. There were no issues with the soccer team players regular baggage as they dropped them off directly at the pit, however, the equipment was a totally different story. At approximately 1900hrs, we were advised by LH that the truck with the equipment was stuck in traffic and wasn't going to arrive for at least another hour, but at 1920 LH ASM Isabelle informed that [*sic*] the equipment should be arriving in the next five minutes. I requested assistance from Crawford via radio to mobilize all the sky caps so that they are standing by. I observed only one skycap standing outside, but not assisting the soccer team and LH ASM Isabelle. I proceeded outside and at this point Crawford was explaining to Isabelle that the skycaps don't want to handle it because of the large quantity of bags and a small tip. I interjected and instructed Crawford to get all the skycaps on departures by revolver #2 to handle these bags immediately. As per Crawford and LH Isabelle, Wills was one of the skycaps who refused to assist and eventually showed up after being called on the radio for the third time. I believe Crawford will fill you in with the additional details as to who were the other employees and supervisors being uncooperative. In attempt to compensate for the

[8] The skycaps did not share the tip with the baggage handlers. (Tr. 115).

> mishandling, I asked Crawford to send over few [*sic*] baggage handlers to assist and Crawford went above and beyond to do so. One of the soccer coaches said to LH ASM that they might as well handle these bags themselves. Even after providing this substandard service, the skycap captain received a tip from LH Isabelle. I'm wordless; how service provider [*sic*] employees don't comprehend their job descriptions, why they have jobs and would refuse to provide skycap services to a partner carrier or any customer for that matter. I must say that in my entire professional career I have never been this embarrassed in front of the customer and I expect that you thoroughly investigate and take appropriate action immediately. I had personally apologized to LH ASM Isabelle on behalf of Terminal One and Alstate, but would highly suggest that you do the same.

(J Ex. 1).

At 5:28 the next morning, Mr. Paquette emailed Alstate Chief Operating Officer Alfred DePhillips; Terminal One President Arthur Mollins; Air France Board of Directors Member Jacques Malot; Korean Airlines Board of Directors Member Jang Schoi; and, Lufthansa Regional Manager Margaret Eaton, to demand Alstate provide an explanation for the skycaps' "unacceptable and embarrassing" behavior *and to demand that each of the skycaps be removed from Terminal One*. Id.

Understandably concerned, Mr. DePhillips instructed Ms. Traynor to conduct an investigation to identify the skycaps involved; and, given Mr. Paquette's instructions to remove the skycaps from Terminal One, terminate their employment. (Tr. 148). Mr. DePhillips – the undisputed sole decision-maker – decided to discharge the skycaps, including Greenidge, because: (1) Mr. Paquette instructed he do so; (2) the skycaps failed to perform their job duties; and, (3) Alstate's customer – TOGA – was "extremely embarrassed" by the skycaps' refusal to assist Lufthansa's passengers. (Tr. 149-150).

The following day – July 19, 2013 – Ms. Traynor contacted Mr. Greenidge (who was not working) and requested he come to the Airport for a meeting. (Tr. 52). During that meeting, Ms. Traynor informed Mr. Greenidge that his employment with Alstate was terminated, and that the Company already had discharged Mr. Wills, Mr. Rodney and Mr. Boodram. (Tr. 53). "[S]he said that she went and watched a video [and] that [the] skycap did the job in record time. And she also said that she told the material [*sic*] and the terminal told her that they don't care. The airline was embarrassed they want all of the skycaps fired." Id. At no point during this meeting did Ms. Traynor mention Mr. Greenidge's purported comments about tips, nor did she indicate Alstate was discharging Mr. Greenidge because of the alleged comment. (Tr. 52-53).

Mr. Greenidge received subsequently a written letter from Ms. Traynor confirming Mr. Greenidge's termination of employment. (Tr. 51). Mr. DePhillips did not instruct Ms. Traynor to draft the letter, nor did Mr. DePhillips review or otherwise approve the letter before it was sent to Mr. Greenidge. (Tr, 50). Dated July 19, 2013, the letter summarizes the July 17th incident as follows: "You were indifferent to the customer and verbally make comments about the job stating you get no tip or it is very small tip. Trevor, you made this comments [*sic*] in front of the other skycaps, Terminal One Mod and the Station Manager of Lufthansa." (J Ex. 2). It goes on to note that Mr. Greenidge previously had received counseling in response to complaints that skycaps were inattentive and "not proactive" and reminds Mr. Greenidge that, less than two years prior, he received a written warning for failing to assist a wheelchair patient. Id. Ms. Traynor thus informs Mr. Greenidge that, in light of this demonstrated pattern of poor performance and established indifference to serving Alstate's customers, Alstate was terminating his employment with the Company, effective immediately.

Id. At no point in this letter does Ms. Traynor write (or imply) that Alstate was discharging Mr. Greenidge because he discussed his tipped wages with coworkers or with his supervisor. Id.

Mr. Greenidge subsequently contacted his Union, Local 660, who informed Mr. Greenidge that the Union was "filling [*sic*] the papers to take it to arbitration." (Tr. 54). Mr. Greenidge has not since been contacted by Local 660. Id.

ARGUMENT

I. THE BOARD LACKS JURISDICTION OVER RESPONDENT

A. The Board Should Have Received An Advisory Opinion As To Whether Respondent Is Subject To The RLA

It is well established that "if it is clear that the employer falls under the jurisdiction of the RLA, the parties should be referred to the [National Mediation Board ("NMB")] and the charge or petition should be dismissed, absent withdrawal. The Board's practice is to refer cases of arguable or doubtful RLA jurisdiction to the NMB for an advisory opinion on the jurisdictional issue." NATIONAL LABOR RELATIONS BOARD CASE HANDLING MANUAL, 11711.1, 11711.2 (2011) (citing Federal Express Corp., 317 NLRB 1155 (1995)).

The Board erred in its failure to obtain such an opinion in the case herein.[9]

B. Respondent Meets The National Mediation Board's Function And Control Tests And Is, Therefore, Subject To The Exclusive Jurisdiction Of The RLA

The National Mediation Board ("NMB") has developed a two-prong test for determining whether entities which are not themselves air carriers or railroads, (i.e., derivative carriers), are subject to the RLA: first, the NMB determines whether the nature of the work performed is that traditionally performed by employees of air or rail carriers (the "function" test);

[9] Though the Board deferred to the NMB initially, evidence it believed jurisdiction in this matter was arguable, it later withdrew that deferral.

second, the NMB determines whether air or rail carriers exercise direct or indirect ownership or control over the entity (the "control" test). See Air Serv Corp., 38 NMB 37 (2011); John Menzies, 31 NMB 107 (2009); Air Serv Corp., 35 NMB 58 (2008); Air Serv Corp., 33 NMB 45 (2006); Empire AeroCenter Inc., 33 NMB 2 (2005); Kanonn Serv. Enter. Corp., 31 NMB 409 (2004); John Menzies PLC, 30 NMB 463 (2003); Complete Skycap Servs Inc., 31 NMB 1 (2003); John Menzies, 30 NMB 404 (2003); Signature Flight, 30 NMB 392 (2003); Evergreen Aviation Ground Logistics Enters., 25 NMB 460 (1998); Service Master Aviation Servs., 24 NMB 181 (1997). Here, Alstate satisfies both tests.

C. Alstate Performs Work Traditionally Performed By Carriers

Alstate's skycap, wheelchair and baggage service employees perform work traditionally performed by air carriers. See, e.g., PrimeFlight Aviation Servs., Inc., 34 NMB 175 (2007) (finding skycap services and wheelchair services to be "services traditionally performed by employees in the airline industry"); Globe Aviation Services, 29 NMB 41 (2000) (finding baggage handling, wheelchair attendance and skycap services to be work traditionally performed by employees in the airline industry); International Total Services, 20 NMB 537 (1993) (same). The work performed by Alstate is identical to the work performed by carriers directly. Thus, the first prong of the NMB's test clearly has been met.

D. TOGA Exercises Direct And Indirect Control Of Alstate

Generally, to determine whether a carrier exerts control over an employer, the NMB focuses on the carrier's role in the employer's daily operations and its effect on the manner in which employees perform their jobs. See, e.g., Bradley Pacific Aviation, Inc., 34 NMB 119 (2007); Evergreen Aviation Ground Logistics Enters., 25 NMB 460 (1998). More specifically, the NMB examines factors such as the carrier's access to the employer's operations; the carrier's

role in personnel decision; the degree to which the carrier directly oversees and supervises the employees; and, the degree to which the carrier affects other conditions of employment (including scheduling, procedures and instructions, quality and performance standards and training). See, e.g., Air Serv Corp., 33 NMB 272 (2006); Service Master Aviation Servs, 24 NMB 181, 183 (1997); Service Master Aviation Servs, 24 NMB 186, 188-189 (1997); North American Aviation, 28 NMB 155, 159 (2001). The carrier's control over the employer also is determined by factors including whether the employer must notify the carrier of complaints or irregularities; whether the employer acts as the carrier's agent at the airport; and, whether the carrier retains broad rights to cancel its contract. North American Aviation, 28 NMB at 159-161; Milepost Indus., 27 NMB 362, 367 (2000); Aeroground, Inc., 28 NMB 510 (2001).

In the instant case, and as factually detailed above, Alstate's air carrier customers (1) play an active role in Alstate's daily operations (see, e.g., Trux Transportation, 28 NMB 518, 523 (2001)); (2) provide instructions to Alstate's employees on various facets of their activities (see, e.g., id. at 524; North American Aviation, 28 NMB at 159); (3) direct work being done by Alstate employees (see, e.g., Trux Transportation, 28 NMB 518, 525 (2001)); AVGR International Business, Inc., 27 NMB 232, 235 (2000)); (4) effectively supervise Alstate employees (see, e.g., Aeroground, 28 NMB at 514; North American Aviation, 28 NMB at 161); (5) meet regularly with Alstate management over service and related issues (see, e.g., North American Aviation, 28 NMB at 161); (6) establish policies and procedures Alstate employees must follow (see, e.g., North American Aviation, 28 NMB at 159); (7) have access to Alstate employees' work areas (see, e.g., Argenbright Security Inc., 29 NMB 340, 344 (2002)); and, (8) reserve the right to audit and inspect records maintained by Alstate (see, e.g., North American Aviation, 28 NMB at 161).

Moreover, recent decisions indicate the most salient factors the NMB considers when deciding whether a carrier exerts the necessary control to render RLA jurisdiction appropriate are whether carriers actively are involved in day-to-day operations and whether carriers discipline and terminate the service provider's employees. See, e.g., Air Serv Corp., 38 NMB 113 (2011); Air Serv Corp., 33 NMB 272 (2006); John Menzies PLC, 30 NMB 463, 475 (2003). In the instant matter, Alstate has demonstrated that its carrier customers significantly are involved in both the Company's daily operations and its major personnel decisions. In fact, it is indisputable that TOGA regularly instructs Alstate employees on how to perform their job functions; what job functions to perform; and, when the job functions should be performed. Further, when Alstate employees do not perform up to TOGA's specifications, TOGA can and does request the offending employees be disciplined, reassigned or terminated. Critically, the facts evidence that Alstate complies with these requests.

E. Public Policy Supports RLA Jurisdiction In This Case

First among the general purposes identified in the RLA is "[t]o avoid any interruption to commerce or the operations of any carrier engaged therein." 45 U.S.C. §151a(a). To serve that purpose the RLA provides "procedures [which] reduce the possibility of work stoppages relating to representation disputes by acknowledging the employee's absolute right to be represented, by forbidding employer interference in the process and by according to the NMB plenary power to resolve representation disputes." Rissetto, Harry, "Overview of the Railway Labor Act," Vol. I, ALI-ABA COURSE OF STUDY MATERIALS ON AIR CARRIER AND RAILROAD LABOR AND EMPLOYMENT LAW at 4. Further serving that purpose is an "almost interminable" collective bargaining process, Detroit, Toledo & St. Louis R.C. v. UTU, 396 U.S. 142, 149

(1969), during which the parties are required to maintain the *status quo* and refrain from self-help which would otherwise disrupt carrier operations. See 45 U.S.C. §156.

Here, avoidance of interruption to commerce and the operation of any carrier employed therein is best served by application of RLA jurisdiction to Alstate and its employees based at JFK. As the record amply demonstrates, carriers, both international and domestic, rely on Alstate for the provision of critical skycap, baggage and wheelchair services. Any disruption to Alstate's operations will, necessarily, disrupt the operation of these air carriers at a time when they need no further disruption. Indeed, the RLA (which provides a comprehensive structure for the avoidance of such disruptions) would be all but marginalized if an entity such as Alstate – and with it the carriers to which it provides essential services – could be subject to localized labor disputes which could readily disrupt the carriers' air transportation services and system.

Protection of the fundamental purposes of the RLA requires steadfast application of the long-settled derivative carrier standards and their application to the facts here. Accordingly, for these reasons as well, the NLRB should find Alstate to be a carrier subject to RLA jurisdiction or, in the alternative, defer this case to the NMB for a determination as to same.

II. RESPONDENT DID NOT VIOLATE THE NATIONAL LABOR RELATIONS ACT

To establish a *prima facie* case of retaliation under the well-established Wright Line doctrine, General Counsel must establish: (1) the employee engaged in protected activity; (2) the employer was aware of the activity; and, (3) the activity was a substantial or motivating reason for the employer's action. Edifice Restoration Contractors, Inc., 360 NLRB No. 29, slip op. at 37 (2014) (citing Naomi Knitting Plant, 328 NLRB 1279, 1281 (1999) (quoting FPC Holdings v. NLRB, 64 F.3d 935, 942 (4th Cir. 1995), enfg. 314 NLRB 1169 (1994))). Only if

the General Counsel establishes a *prima facie* case does the burden shift to Respondent to prove, by a preponderance of the evidence, that it would have taken the adverse action against the employee even in the absence of his protected conduct.[10] As set forth more fully below, General Counsel has failed to carry his burden.

A. General Counsel Failed To Establish A *Prima Facie* Violation Of Section 8(A)(1)

1. Mr. Greenidge Did Not Engage In Protected Concerted Activity

Counsel for General Counsel characterizes Mr. Greenidge's alleged protected concerted activity as "engag[ing] in conversations with his co-workers about tips." (Tr. 6). Mr. Greenidge clarified later that the "conversation" was nothing more than an offhand remark in response to Mr. Crawford's direction to assist the Lufthansa passengers upon their arrival. (Tr. 34). Specifically, after learning Lufthansa requested skycap services for "some bags for the soccer team," Mr. Greenidge stated: "We did a similar job a year prior and we didn't receive a tip for it." (Tr. 34). According to Mr. Greenidge, he made this comment in the presence of Mr. Boodram, Mr. Rodney and Mr. Wills. (Tr. 34).

The Act is not a shield protecting employees from any and all actions or misconduct. Rather, the Act protects only the rights of employees "to engage in . . . concerted activities for the purpose of collective bargaining *or other mutual aid or protection*. To be protected, therefore, employee activity must be both 'concerted' in nature and pursued either for union-related purposes aimed at collective bargaining or for other 'mutual aid or protection.'" See, e.g., Republic Aviation Corp., 324 U.S. 793 (1945). Here, General Counsel offered no

[10] Under the commonly accepted definition of "preponderance," Respondent must show only that it is "more probable than not" that it would have terminated Mr. Greenidge's employment regardless of any purported protected concerted activity. See e.g., BLACK'S LAW DICTIONARY ("Preponderance of evidence" means "evidence which as a whole shows that the fact sought to be proved is more probable than not.").

evidence to establish that Mr. Greenidge's comment about not receiving a tip a year earlier was either concerted or protected.

To establish conduct was "concerted," General Counsel must show that the employee engaged in or affirmatively sought to initiate, induce or prepare for group action. Meyers Industries, 281 NLRB 882, 887 (1986). "'Mere griping' of employees, without the intent to engage in further action, is not protected." Mushroom Transportation Co., Inc. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964). General Counsel has not provided any evidence to suggest – and Mr. Greenidge denies – that Mr. Greenidge made the comment "We did a similar job a year prior and we didn't receive a tip for it" with the intent to induce or prepare group action among his fellow skycaps.

Should General Counsel rely on a theory of "inherently concerted activity" – i.e., that individual comments about wages are protected even if not made with the intent of inducing group action – we note that this interpretation has been rejected by *every Court of Appeals to consider the issue*. See Alternative Energy Applications, Inc., 361 NLRB No. 139, slip op. at 31 (Member Miscimarra, dissenting in part) (citing Trayco of S.C., Inc., 297 NLRB 630, 634-635 (1990) (wage discussions inherently concerted), enf. denied mem. 927 F.2d 597 (4th Cir. 1991) (although employee "discussed her concerns about wages with other employees, there is no evidence to indicate that she sought to induce any type of group action")); Aroostook County Regional Ophthalmology Center, 317 NLRB 218, 220 (1995) (discussions about work schedules inherently concerted), enf. denied in pert. part 81 F.3d 209, 214 (D.C. Cir. 1996) (rejecting inherently concerted theory, "which, on its face, appears limitless and nonsensical. . . [A]doption

of a per se rule that any discussion of work conditions is automatically protected as concerted activity finds no good support in the law.")).[11]

Nevertheless, assuming the inherently concerted theory legally was valid, and it is not, such theory is inapplicable to the case at hand as, even if Mr. Greenidge's comment was concerted, *it was not made to seek mutual aid or protection and therefore is not protected*. It is well-established that, to be for the purpose of mutual aid or protection, "concerted activity must seek to 'improve terms and conditions of employment or otherwise improve [employees'] lot as employees." Dignity Health d/b/a St. Rose Dominican Hospitals, 360 NLRB No. 126, slip op. at 8 (2014) (quoting Eastex v. NLRB, 437 U.S. 556 (1978)).

Mr. Greenidge did not make the alleged comment for the "benefit of all his fellow employees." Id. at 11 (quoting Phillips Petroleum Co., 339 NLRB 916, 918 (2003)). To the contrary, Mr. Greenidge denied emphatically making the comment out of concern the skycaps would not receive a tip for the July 17th assignment, and confirmed that he was not asking Mr. Crawford to take any kind of action or change "any kind of policy." (Tr. 74-75).[12] He testified specifically that he was not upset about not receiving a tip the year prior, stating "I wasn't upset .

[11] To the extent General Counsel cites Automatic Screw Products Co., Inc., 306 NLRB 1072 (1992), enfd. mem. 977 F.2d 582 (6th Cir. 1992), the Board in that case found a policy prohibiting employees from discussing their salaries to be unlawful. As the rule itself was overbroad, the employer's discharge of an employee for violating said rule was itself an unfair labor practice. In no way does Automatic Screw Products Co., Inc. stand for the proposition that any comment about wages is "inherently concerted" and therefore protected by the Act.

[12] The transcript notes Mr. Greenidge responded "I wasn't taken in about that" to Judge Green's question "It doesn't sound to me like you were asking Mr. Crawford to do anything one way or the other, whether he should change any kind of policy[?]" (Tr. 75). In light of the frequent typographical errors throughout the transcript, we submit that "taken in" should read "talking."

. . I was happy to do the job. It was part of my job." (Tr. 74) In fact, Mr. Greenidge summarized his purportedly protected activity as "*It was just a comment that I made*." (Tr. 75).[13]

"Just a comment that I made" is not protected activity. Regardless of whether or not the comment Mr. Greenidge made tangentially was related to his tipped wages (over which Respondent has no control), *Mr. Greenidge testified clearly that he was not seeking mutual aid or protection*, nor could any reasonable person infer that from "just [this] comment." This is not a situation where employees were discussing their wages – conversations that are necessary to, for example, determine whether the employer is paying its employees disparately or whether the employees are underpaid – this was a stray comment that Mr. Greenidge made, apparently, "just" because. Absent a showing that the comment was protected – i.e., intended to improve or otherwise redress the employees terms and conditions of employment – a stray comment is not protected by the Act simply because he mentioned the word "tip". Any finding to the contrary would render the Act's "mutual aid or protection" requirement obsolete.

2. General Counsel Cannot Establish That Mr. DePhillips Was Aware Mr. Greenidge Engaged In Protected Concerted Activity

Even assuming Mr. Greenidge's comment was protected, General Counsel has not satisfied the second Wright Line prong, as he failed to establish Mr. DePhillips, the undisputed sole decision-maker, knew or believed that Mr. Greenidge engaged in the alleged protected concerted activity.

[13] Nor could Mr. Greenidge's alleged comment be compared to the types of activity found to be "inherently concerted" by the Board. In Alternative Energy Applications, Inc., for example, the employee had "discussed issues relating to overtime pay" with his coworkers, and was alleged to have informed other employees that he received a raise ahead of established schedule. 361 NLRB at *7. In Sabo Inc. d/b/a Hoodview Vending Co., 362 NLRB No. 81 (2015), two employees discussed their employer's recent posting of a "help wanted" sign and how that sign might affect their future job security, a topic of "mutual (and obvious) concern . . ." As discussed herein, Mr. Greenidge had no such concern.

a. General Counsel Did Not Establish Mr. DePhillips Had Actual Knowledge Of Mr. Greenidge's Alleged Protected Concerted Activity

Mr. DePhillips based his decision to terminate Mr. Greenidge's employment solely on Mr. Paquette's July 18th email and Ms. Fitzgerald's summary of events attached thereto. (Tr. 152). However, while Ms. Fitzgerald writes at length about the skycaps' refusal to assist Lufthansa and the soccer team passengers, she does not claim that Mr. Greenidge – or, for that matter, any other skycap – made a single comment about tipped wages or otherwise engaged in the protected concerted activity alleged by General Counsel. (J Ex. 1). Rather, the email notes only that *Mr. Crawford* stated the skycaps "don't want to handle it because of the large quantity of bags and no tip." Id. Ms. Fitzgerald provides no further information or context about the statement – she does not indicate, for example, whether Mr. Crawford had a conversation with the skycaps regarding their reasons for refusing the assignment, or whether Mr. Crawford merely suggested his own opinion as to the skycaps' motivation. Id.

Although General Counsel may argue Mr. DePhillips assumed or otherwise inferred from Ms. Fitzgerald's email that the skycaps told Mr. Crawford they would not assist with the soccer team's luggage because of the anticipated tip, the standard is whether Mr. DePhillips *actually* knew, not whether he "should or reasonably could have known." Reynolds Electric, Inc., 342 NLRB 156, 157 (2004); see also Hitachi Capital America Corp., 361 NLRB No. 19, slip op. at n.5 (citing Reynolds Electric, Inc., and noting that Board precedent requires that "an employer must know or believe that an employee's actions are of a [protected] concerted nature to establish a violation of Sec. 8(a)(1) of the Act."). To meet this standard, and thus to meet his burden of establishing a *prima facie* case, General Counsel must proffer actual evidence of knowledge – mere suspicion is insufficient. See Amcast Automotive of Indiana, Inc., 384

NLRB 836, 839 (2006) (knowledge "must rest on something more than speculation"); Sears, Roebuck & Co. v. NLRB, 349 F.3d 493 (7th Cir. 2003) (denying enforcement of Board's order against employer and finding that, for purpose of a *prima facie* case under 8(a)(1), an employer can only be said to know of the employee's protected activities through the decisionmaker.").

General Counsel has not met this standard. There is no evidence to suggest, let alone establish, that at the time he decided to discharge Mr. Greenidge, Mr. DePhillips knew Mr. Greenidge had stated "We did a job like this last year and we didn't get a tip." The email upon which Mr. DePhillips based his decision to terminate does not mention Mr. Greenidge's allegedly protected activity, nor did General Counsel provide evidence of how Mr. DePhillips might otherwise have learned of such activity. (J Ex. 1). Thus, General Counsel did not meet his burden of demonstrating Respondent acted with the requisite knowledge required under Wright Line and its progeny and cannot excuse his failure to do so with mere conjecture.[14]

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[14] To the extent General Counsel argues Ms. Traynor's July 19th letter proves Respondent had knowledge of Mr. Greenidge's protected activity, the evidence is clear that Ms. Traynor did not participate in the termination decision, nor did Mr. DePhillips consult with Ms. Traynor prior to making the decision. Mr. DePhillips testified he instructed Ms. Traynor to "investigate" the incident to determine what skycaps actually were involved, as Ms. Fitzgerald's summary report is unclear as to the identity of the insubordinate employees. (Tr. 148). The investigation did not affect his decision to terminate, just clarified specifically which employees would be discharged. (Tr. 148). General Counsel cannot argue Ms. Traynor was a decision-maker based on her signature on the termination letter, as the Board previously has held that, when there is conflicting testimony about an individual's involvement in a discipline decision, the fact the individual signed the disciplinary form is not dispositive and cannot alone prove that he or she was a decision-maker. Gardner Fields, Inc., 2014 NLRB Reg. Dir. Dec. LEXIS 35 (2014).

Thus, even if Ms. Traynor did know about Mr. Greenidge's conduct, this knowledge cannot be imputed to Respondent absent evidence Ms. Traynor participated in the decision to terminate Mr. Greenidge's employment after learning of his allegedly protected activity or informed Mr. DePhillips of Mr. Greenidge's comments before Mr. DePhillips decided to discharge the skycaps. The Board and the courts consistently have held that "institutional knowledge" of protected concerted activity is not sufficient to establish a *prima facie* case under Wright Line. To allow General Counsel to prove simply that a manager – any manager – was aware of protected activity without evidence that the actual decision-maker knew about the specific employee's protected concerted activity would undermine completely the burden established by the Board with the Wright Line test. As noted by the Seventh Circuit Court of Appeals in a decision denying enforcement of a Board order:

> [R]egarding imputation, courts have generally rejected the NLRB's attempts to simply attribute a foreman or supervisor's knowledge of an employee's

b. Assuming, *Arguendo*, Mr. DePhillips Did Impute Mr. Crawford's Statement To Mr. Greenidge Himself, Such Comment Was Not Protected Concerted Activity

Moreover, even if it could be assumed – without any evidentiary support – that Mr. DePhillips attributed the comment "don't want to handle it because of the large quantity of bags and no tip" to the skycaps themselves, such comment is an unlawful threat of partial strike, not protected concerted activity.[15] It is beyond cavil that employees "cannot pick and choose the work they will do or when they will do it. Such conduct constitutes an attempt by the employees to set their own terms and conditions of employment in defiance of their employer's authority to determine those matters and is unprotected." Audubon Health Care Center, 268 NLRB 135, 136 (1983). Accordingly, employees who threaten or engage in a partial strike" – i.e., a strike in which "employees refuse to work on certain assigned tasks while accepting pay or while

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> [protected] activities to the company. *Automatically imputing such knowledge to a company improperly removes the General Counsel's burden of proving knowledge.*

Vulcan Basement Waterproofing of Illinois, Inc. v. NLRB, 219 F.3d 677, 685 (7th Cir. 1985) (emphasis added) (collecting numerous court of appeals decisions). Moreover, Mr. DePhillips made the decision to discharge Mr. Greenidge on July 18th – one day before the date of the letter – and Mr. Greenidge received the letter *after* he already was discharged. (Tr. 148-149, J Ex. 2). When Ms. Traynor informed Mr. Greenidge of his termination, she made no mention of his alleged comments, or otherwise implied the decision was related to his purported protected activity. (Tr. 53). Thus, even if the letter did establish Ms. Traynor had knowledge of Mr. Greenidge's protected activity, it does not demonstrate she had knowledge at the time Mr. DePhillips made his decision.

Finally, even if Ms. Traynor was a decision-maker, the July 19th letter demonstrates only that Ms. Traynor believed Mr. Greenidge complained about not receiving an adequate tip to Alstate's customers (specifically, the "Terminal One Mod and the Station Manager of Lufthansa"). (J Ex. 2). It is beyond dispute that employers can discipline employees for inappropriate interactions with customers during work hours. See Double Eagle Hotel & Casino, 341 NLRB 112 (2004) (holding employers in a retail-like setting, i.e., one where customers frequent, "could lawfully prohibit employees from . . . discussing their working conditions in the [areas] frequented by customers . . . "). Significantly, this case dealt with a restriction on employees' ability to discuss their wages in front of casino customers. While the Board found the rule would have been permissible if limited to customer areas, it was overly broad because it extended to areas where customers were unlikely to be present. Here, Ms. Traynor expressed a belief that Mr. Greenidge made a statement *to the customer*. (J Ex. 2). Further, Mr. Greenidge stated that when he made his alleged remark, he was in a passenger area, where passengers were present. (Tr. 34). See also Simon DeBartolo Group, 357 NLRB No. 157, slip op. at 47 (2011) (employees' protected right to interact with customers is limited only to "nonworking time in nonworking areas.").

[15] Notably, Mr. Greenidge denies that any of the skycaps stated they were not going to do the job. (Tr. 60).

remaining on the employer's premises . . ." lose protection of the Act. Id., see also Vakkey City Furniture Co., 110 NLRB 1589, 1592 ("[T]hreatening to engage in a partial strike [is] an activity long considered outside the protection of the Act.").[16]

Mr. Greenidge could not refuse or threaten to refuse to perform the Lufthansa assignment, regardless of any stated reason for doing so.[17] This creates an unavoidable *Catch-22* fatal to General Counsel's claims. Either Mr. DePhillips did not believe the statement by Mr. Crawford actually was made by Mr. Greenidge (in which case Mr. DePhillips had no knowledge or belief of Mr. Greenidge's protected concerted activity), or he did (in which case Mr. Greenidge threatened an unlawful partial strike and did not engage in protected concerted activity). Both require the Amended Complaint be dismissed.

3. General Counsel Cannot Establish A Nexus Between Mr. Greenidge's Alleged Protected Concerted Activity And His Discharge

Finally, General Counsel has not shown a causal link between the alleged protected concerted activity and Mr. DePhillips' decision to discharge Mr. Greenidge. As established at the hearing, Mr. DePhillips instructed Ms. Traynor to terminate Mr. Greenidge's employment based on the instructions and information contained in Mr. Paquette's July 18th email, and Ms. Fitzgerald's report included therein. Mr. DePhillips' decision was a reaction to his customer's legitimate and compelling complaints – complaints which, notably, had *nothing* to do with Mr. Greenidge's purportedly protected activity.

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[16] The email does not state or imply that the skycaps threatened or engaged in an actual work stoppage – just that the skycaps refused this particular assignment. (J Ex. 2). Moreover, Mr. Greenidge testified he was "on the curb awaiting passengers" from the time Mr. Crawford informed him of Lufthansa's request for skycap assistance until the time he began actually assisting with the soccer team's luggage. (Tr. 33).

[17] There have been no allegations of an unsafe workplace. Further, the testimony establishes skycaps were required to assist *all* customers as a mandatory condition of their job. (Tr. 59) ("Our job is to help all people, regardless of tip or not").

In her report, Ms. Fitzgerald makes only a passing reference to Mr. Crawford's remark that the skycaps would not perform the Lufthansa assignment because of the "small tip." (J Ex. 1). She does not express concern or outrage about Mr. Crawford's statement, nor does she indicate an objection to Alstate's skycaps engaging in tip- or wage-related conversations. In fact, other than to note Mr. Crawford made the statement, she does not comment at all about the issue. Compare this with the portion of her report detailing the skycaps' refusal to assist Lufthansa:

> I'm wordless; how service provider employees don't comprehend their job descriptions, why they have jobs and would refuse to provide skycap services to a partner carrier or any customer for that matter. I must say that in my professional career, I have never been this embarrassed in front of a customer . . . .

It was clear Ms. Fitzgerald was complaining about the skycaps obstinate refusal to do their job, not Mr. Crawford's statement about their tips, and Mr. DePhillips confirmed this was how he interpreted Ms. Fitzgerald's email. (Tr. 148-150). Mr. Paquette's email likewise fails to indicate he was angry or upset about the skycaps' discussing tipped wages, noting that the incident described by Ms. Fitzgerald was "unacceptable and embarrassing to say the least . . . ." Thus, the record evidence proves Respondent discharged Mr. Greenidge because of customer complaints that he refused to assist passengers as required, not that he remarked "We did a job like this last year and we didn't get a tip".

This lack of causation is buttressed further by the fact Respondent terminated the three other skycaps involved in the July 17th incident. If Mr. Greenidge's purported comment was a substantial or motivating factor in Alstate's decision to terminate his employment, there is no reason Respondent would have discharged those employees who did not make the comment.[18]

[18] Mr. Boodram testified that, a year after his termination, he was hired by Airway, which he believes is a different company, as part of a grievance he had filed with Local 660. (Tr. 132). He completed new hire

B. A Preponderance Of The Evidence Establishes That Respondent Would Have Discharged Mr. Greenidge Even In The Absence Of Protected Conduct

Assuming General Counsel could establish a *prima facie* case (which, as set forth above, he cannot), the Amended Complaint still must be dismissed because Respondent established by a preponderance of the evidence that Mr. Greenidge's employment would have been terminated even in the absence of any alleged protected conduct. The record evidence set forth below weighs heavily in favor of Respondent meeting its burden.

1. Mr. Greenidge's Inconsistent And Self-Serving Testimony Aside, The Record Establishes Mr. DePhillips, Ms. Roeder And Ms. Fitzgerald All Believed Mr. Greenidge Refused To Assist The Lufthansa Passengers

Mr. Greenidge denies that he refused to assist the Lufthansa passengers, testifying that he proceeded to the truck "just about a minute or two" after it arrived. (Tr. 39). According to Mr. Greenidge, the soccer team had 38 bags, at least 15 of which he personally (1) transported into the terminal; (2) "ticketed" at the Lufthansa counter; and, (3) brought to the Transportation Security Administration ("TSA") for processing. (Tr. 40-43).

As a preliminary matter, Mr. Greenidge's self-serving testimony was contradicted repeatedly by his fellow skycap, Mr. Boodram, as well as by Ms. Fitzgerald, a third-party employee with no personal investment in this matter. Mr. Boodram testified there were "eighty plus worth of baggage," and that the skycaps brought the bags "*[d]irectly to the TSA checkpoint where they were tagged by the airline*." (Tr. 111-112).[19] Ms. Fitzgerald testified similarly that

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paperwork, has a new supervisor, and has different job responsibilities. (Tr. 133). Mr. Wills and Mr. Rodney also were hired as cleaners for Airway.

Mr. Boodram was not reinstated to a new position.

[19] Mr. Boodram testified that, a year after his termination, he was hired by Airway, which he believes is a different company than Alstate, as part of a grievance he had filed with Local 660. (Tr. 132). He completed new

the fifty to seventy "equipment and . . . regular bags" were ticketed by the "airline agent, Lufthansa." (Tr. 188-189). In light of these contradictions, Mr. Greenidge's testimony regarding his work performance must be discredited.

2. Ms. Fitzgerald And Ms. Roeder Believed The Skycaps Refused The Assignment

Regardless, whether Mr. Greenidge actually performed the assignment is irrelevant, as the evidence establishes *Ms. Fitzgerald and Ms. Roeder* believed the skycaps refused initially to assist the Lufthansa passengers and performed the task in an unacceptable and unprofessional manner. Both Ms. Fitzgerald and Ms. Roeder testified consistently that the skycaps refused to assist the soccer team when the truck arrived as instructed (169-170, 181) and that the skycaps ignored Ms. Fitzgerald's and Ms. Roeder's subsequent attempts to get their attention (170, 182). Ms. Fitzgerald confirmed that she had to request baggage handlers perform skycap services, and that the baggage handlers were the first Alstate employees to assist the soccer team passengers. (Tr. 182). Ultimately, Ms. Fitzgerald characterized the incident as "very embarrassing" because "*we've never experienced somebody totally denying to provide the*

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hire paperwork, has a new supervisor, and has different job responsibilities. (Tr. 133). Mr. Wills and Mr. Rodney also were hired as cleaners for Airway. (Tr. 124).

Mr. Boodram was hired by Airway as part of a grievance settlement procedure, as were Mr. Wills and Mr. Rodney. There is no testimony suggesting the Union pursued similar settlement discussions with Alstate regarding Mr. Greenidge, nor is there evidence Alstate denied a request from the Union to recommend Mr. Greenidge's hire with Airway. Moreover, there is no evidence suggesting which (if any) Alstate representatives participated in Airway's decision to hire Mr. Boodram, Mr. Wills and Mr. Rodney. Counsel for General Counsel could have pursued this line of questioning with Mr. DePhillips, but ultimately chose not to even explore the issue. To allege baselessly that this is evidence of retaliation or unlawful motive, without any underlying evidence or any testimony regarding the issue, is illogical at best and disingenuous at worst. If General Counsel wished to pursue a failure to hire claim against Airway – which General Counsel has not alleged, let alone proven, is a joint employer with Alstate – he should have done so.

service." (Tr. 184). Thus, the record establishes that, regardless of Mr. Greenidge's personal belief about his performance on July 17th, Ms. Fitzgerald and Ms. Roeder believed the skycaps refused to perform their job.[20]

3. Mr. DePhillips Discharged Mr. Greenidge Based On Mr. Paquette's Directive And Ms. Fitzgerald's Established Belief That The Skycaps Refused To Perform Their Job Duties

The record establishes similarly that Mr. DePhillips believed Ms. Fitzgerald and Ms. Roeder – Alstate's direct and secondary customers – were upset about the skycaps refusal to assist the Lufthansa passengers and based his on their expressed frustration.

As detailed *infra*, Mr. DePhillips testified that, after learning of the July 17th incident *via* Mr. Paquette's email and Ms. Fitzgerald's report, he determined he had to discharge the skycaps involved, both because Mr. Paquette demanded he do so and because the skycaps refused to perform their job duties. This has not and cannot be refuted by General Counsel. Further, and as stated above, Ms. Fitzgerald's report focused almost entirely on the skycaps refusal to "provide skycap services to a partner carrier or any customer . . . ." (J Ex. 2). She does not express similar (or any) displeasure about Mr. Crawford's statement as to why the skycaps refused the assignment, nor does she mention at all Mr. Greenidge's alleged comment about "We did a job like this last year and we didn't get a tip." Id. This supports Mr. DePhillips

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[20] General Counsel likely will argue Alstate knew the skycaps performed the job, based on Ms. Traynor's July 18th email. This email, however, notes that it took twelve minutes to actually transfer the bags into the terminal. However, and as Ms. Fitzgerald's report and testimony establishes, the issues was not with the service performed once the bags were taken from the truck, but rather the skycaps initial and unprofessional refusal to perform the job at all. Moreover, it should be noted that it is likely the work itself was performed in "record time" because the skycaps began assisting the passengers only after the baggage handlers already had brought in two carts of bags. There thus were more than just skycaps working on the task.

Similarly, if there was no delay and Mr. Greenidge performed the assignment in a prompt and professional manner, there is no reason the players themselves would have complained that they "might as well have handled these bags themselves." (J Ex. 1). Surely General Counsel does not submit the German soccer team complained about a comment that they would not have heard, or otherwise engaged in some conspiracy with Lufthansa and Terminal One to provide false complaints to Alstate.

testimony that he was reacting to his customer's complaint, not to Mr. Greenidge's unreferenced protected activity. (Tr. 148-150). That Mr. DePhillips had no knowledge of Mr. Greenidge's purportedly protected conduct at the time he made the decision to terminate his employment only further supports that Respondent would have discharged Mr. Greenidge regardless of the protected activity.

Moreover, Mr. DePhillips viewed Mr. Paquette's directive to "remove [the skycaps] from the Terminal One project immediately" as a directive to terminate their employment. (Tr. 148-149).

4. The Board Consistently Has Held That An Employer Who Discharges An Employee For Refusing To Perform His Job Duties Satisfies Its Burden Under *Wright Line*

The Board consistently has held that employees, like Mr. Greenidge, who are terminated for refusing a directive to perform their required job functions would have been terminated even in the absence of any alleged protected conduct. In Jos. Schlitz Brewing Co., 240 NLRB 710 (1979), the Board found an employer did not violate the Act when it discharged an employee for refusing to work a day-shift as assigned, as such conduct was an "open and deliberate defiance of supervision." Id. at 713. Though General Counsel alleged the employee was discharged for his shop steward activities, the Board noted correctly that such protected activity "should not furnish the basis for immunity from . . . acts of insubordination." Id.

Likewise, in B.C. Lawson Drayage, Inc., 299 NLRB 810 (1990), the Board found an employee's refusal to report to his dispatcher before clocking out, as required by the employer's rules, "constituted insubordination, thus causing him to lose the protection Sec. 7 otherwise could have provided." Id. at 810, n.1 (citing Carolina Freight Carriers Corp., 295 NLRB 1080 (1989) (employee's discharge was lawful despite allegations that the employer

retaliated against him for engaging in protected concerted activity, as employee's challenge of supervisor's direction to clock out of work was insubordination).

Numerous cases have held similarly. See, e.g., Sec. Walls, LLC, 356 NLRB No. 87, slip op. at *67-69 (employees who refused to work overtime was lawful, as employees refusal to perform overtime was "nothing more than [an] attempt to unilaterally determine their terms and conditions of employment, conduct that is not protected by the Act."); Akal Security, Inc., 354 NLRB 122 (2009) (discharge of employees warranted where they held unauthorized meeting); Elko Gen. Hosp., 347 NLRB 1425, 1427 (2006) (employer satisfied Wright Line burden where it demonstrated, *inter alia*, that it discharged employee for ignoring a supervisor's instructions to sit down during a meeting and to return to work after the meeting concluded); Bird Engineering, 270 NLRB 1415, 1415, n.3 (1984) (employees who ignored management directive not to leave work premises for lunch engaged in insubordination and thus their employer was justified under the Act in terminating their employment).

Mr. Greenidge refused to do his job. He believes now that he should be protected because he made one comment to a supervisor about a tip. He cannot hide behind that one comment as a cloak to his inappropriate and insubordinate behavior. His misconduct was unjustifiable, warranted termination, and would have resulted in his discharge even absent any allegation of protected concerted activity.

III. GENERAL COUNSEL'S WITNESSES SHOULD NOT BE CREDITED

A. Trevor Greenidge Should Not Be Credited

Mr. Greenidge's self-serving testimony generally was unbelievable and unreliable and thus should be discredited. Mr. Greenidge was inconsistent and contradictory with regard to both critical and less essential areas of the case. Based on the overall inconsistent nature of his

testimony, it is clear Mr. Greenidge's recollection of events is unreliable. Below are highlights of numerous instances of inconsistencies:

- Mr. Greenidge testified that he was assigned to assist with the soccer team's *bags* as opposed to their *equipment*. (Tr. 198). This is in direct contradiction to the testimony of Mr. Boodram, Ms. Fitzgerald *and Mr. Greenidge's own affidavit filed previously with the Board, wherein he stated "a little truck pulled up and they told us that a truck with some equipment for a soccer team would be arriving for Lufthansa Airlines."* (Tr. 198). Moreover, it is an obvious attempt to conform his testimony and actions to Ms. Fitzgerald's report, wherein she states "[t]here was no issue with the soccer team players regular baggage as they dropped them off at the pit, however, the equipment was a totally different story." (J Ex. 1).
- Mr. Greenidge attests that he learned about the assignment *after* the truck arrived, despite testifying that he learned about the Lufthansa assignment *before* the truck's arrival (Tr. 34, 198).
- Mr. Greenidge testified he made the comment regarding tips to Mr. Crawford, Mr. Wills, Mr. Rodney and Mr. Boodram after Mr. Crawford informed the four skycaps of the Lufthansa assignment, except *Mr. Boodram denied hearing the comment and denied further that he was present when Mr. Crawford informed Mr. Greenidge about the Lufthansa soccer team*. (Tr. 108-110). Instead, Mr. Boodram states *Mr. Greenidge* informed him of the assignment after the truck had arrived and after the driver had started unloading the bags. (Tr. 108-110). Thus, Mr. Greenidge's sole witness to his purported protected activity denies it actually occurred.

- Mr. Greenidge testified he and Mr. Boodram initially were the only skycaps assisting the soccer team, and were joined by Mr. Wills and Mr. Rodney only after they had begun completing the job. Mr. Boodram, however, testified that at least three skycaps began the job together.
- Mr. Greenidge testified there were 38 bags – a specific number, and one wildly disputed by two other witnesses (including General Counsel's own witness).
- Mr. Greenidge testified he ticketed the bags – again, disputed by both Mr. Boodram and Ms. Fitzgerald.

Testimony replete with contradictions and inconsistencies, such as those detailed above and found throughout Mr. Greenidge's testimony, are not entitled to any weight. Service Employees Int'l Union, 322 NLRB 402 (1996) (witness' testimony not credited due to internal contradictions). Additionally, his testimony was inconsistent with his affidavit to the Board. Underwriters Lab v. NLRB, 147 F.3d 1048 (9th Cir. 1998) (witness discredited due to inconsistent nature of testimony and inconsistencies with prior statement to the Board).

B. Terrance Boodram Should Not Be Credited

As detailed above, there are numerous and significant inconsistencies between Mr. Greenidge's and Mr. Boodram's testimony, casting doubt on both witnesses' credibility. These inconsistencies aside, however, Mr. Boodram's testimony regarding his meeting with Ms. Traynor and learning of Alstate's decision to discharge his employment must be disregarded, as Mr. Boodram was not testifying from his memory of the meeting, but rather reading from the termination notice he subsequently received.

When asked what happened when Mr. Boodram arrived at Ms. Traynor's office on the day in question, Mr. Boodram did not testify that Ms. Traynor informed him he was being

discharged because of tip-related comments. (Tr. 118). To the contrary, Mr. Boodram testified Ms. Traynor informed him he was being discharged because "there were some unprofessional comments or – what do you call it – behavior I guess, you know directed towards the customer of the job that we performed the day before or two days before." (Tr. 118). *Mr. Boodram proceeded to say he asked Ms. Traynor what comments were made, "and she said she wasn't told that. She was only told by the terminal manager that comments were made and that – what do you call it? – performed in an unprofessional way."* When asked directly by General Counsel whether Ms. Traynor "t[old] you what she understood the comments to be about?" *Mr. Boodram stated "No."* (Tr. 119).

Only after referencing his termination notice (which General Counsel provided to him during the relevant portion of his testimony) did Mr. Boodram first allege that Ms. Traynor stated he was being discharged because of tip-related comments. Mr. Boodram – who did not indicate his recollection was refreshed by the letter – appeared unable to distinguish between what he remembered from the meeting and what he was reading from the letter. (Tr. 121). His initial testimony – that Ms. Traynor did *not* claim Alstate was discharging him because there were comments made or discussion had about tips – should be credited, as such testimony was uninfluenced by his review of the termination letter itself. Moreover, Mr. Boodram's initial testimony was consistent with Mr. Greenidge's, who denied similarly that Ms. Traynor stated during his discharge meeting that Alstate was terminating his employment because of tip-related comments.[21]

[21] If Ms. Traynor knew, as General Counsel purports, that Mr. Greenidge made the alleged tip-related comments, and was discharging him for same, it is illogical to conclude she would bring up the comments in Mr. Boodram's termination meeting, but not Mr. Greenidge's.

IV. RESPONDENT'S WITNESSES SHOULD BE CREDITED

A. Isabelle Roeder And Klaudia Fitzgerald Should Be Credited As They Are Disinterested Witnesses

Despite any arguments to the contrary, Ms. Roeder's and Ms. Fitzgerald's testimony is credible, as neither witness has any personal motivation in the outcome of this matter. Both disinterested witnesses testimony contained substantial detail, further reiterating that the skycaps failure to provide service was unusual and memorable. Any variance in their testimony was slight, and explained by their different vantage points during the incident in question. To the extent either Ms. Roeder or Ms. Fitzgerald were unable to recall immaterial or minor details, such lack of recollection is commonplace when testifying as to events that occurred more than two years' prior to their testimony.

B. Al Dephillips' Testimony Should Be Credited

Mr. DePhillips testified honestly and candidly. His demeanor during both direct and cross examination was non-argumentative and cooperative, and his answers were honest and forthcoming. Unlike Mr. Greenidge and Mr. Boodram, Mr. DePhillips provided truthful answers to the questions asked of him, even when such answers could have been perceived as damaging to Respondent's position.

For example, Mr. DePhillips did not deny Respondent conducted an investigation into the July 17th incident. However, as he stated candidly, the investigation was to identify the skycaps involved therein, so that Mr. DePhillips could respond appropriately to Mr. Paquette's

demand for a "full report" and removal of the skycaps from service. (J1). Mr. DePhillips never denied (nor was he asked by Counsel for General Counsel) how he was expected to prepare such report absent some understanding of the underlying factual circumstances. However – and as noted repeatedly by Mr. DePhillips – he informed Ms. Traynor to discharge the employees involved based solely on Ms. Fitzgerald's report and Mr. Paquette's email. His testimony on this matter was consistent and forthright, and there simply is no evidence proffered by General Counsel that otherwise could dispute this integral fact.

Mr. DePhillips testimony on other matters similarly was reported objectively, consistently and truthfully. His testimony in all respects is reliable and he should be credited as a witness.

CONCLUSION

As set forth above, Respondent discharged Mr. Greenidge after he refused – unjustifiably and unprofessionally – to provide services to airline passengers. His discharge was in no way related to his alleged protected activity. Thus, and because the Board lacks jurisdiction over Respondent, the Complaint should be dismissed.

Respectfully submitted,

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